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In the Supreme Court of the United States

CYAN, INC., *et al.*,
Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Private Securities Litigation Reform Act of 1995 ("Reform Act") amended federal securities laws to curb abuses of the class action device that were negatively impacting the national securities market. Three years later, to prevent plaintiffs from circumventing the Reform Act by filing class actions in state court, the Securities Litigation Uniform Standards Act ("SLUSA") *inter alia* amended the Securities Act of 1933 ("1933 Act") to remove state-court subject matter jurisdiction over certain "covered class actions."

In this case, Respondents filed a class action in California state court alleging only federal-law claims under the 1933 Act. The question presented is as follows:

Whether state courts lack subject-matter jurisdiction over covered class actions that allege only 1933 Act claims.

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a nonprofit public-interest law and policy center with supporters in all fifty states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in numerous cases related to the proper scope of the federal securities laws. *See, e.g.*, *Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Sec.*, 137 S. Ct. 811 (2017); *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Amgen, Inc.* v. *Conn. Ret. Plans & Trust Funds*, 568 U.S. 455 (2013); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336 (2005).

WLF agrees with Petitioners that SLUSA withdrew state courts' concurrent jurisdiction over covered class actions alleging 1933 Act claims. WLF submits this

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned state that no counsel for Petitioners or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of Rules of this Court, letters of consent from all parties to the filing of the brief are on file or have been submitted to the Clerk of the Court.

brief to elucidate the meaning of SLUSA by examining the broader legislative framework within which the statute was designed to operate, and to discuss the policy implications of interpreting SLUSA in a manner that would disrupt and undermine this carefully balanced system.

In particular, WLF believes interpreting SLUSA to permit concurrent jurisdiction over 1933 Act covered class actions would seriously undermine the Reform Act, not only as to 1933 Act claims that Congress intended would be brought in federal court, but also as to related claims under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") proceeding simultaneously in federal court. As a practical matter, this would expand the limited, judicially-created private right of action for Rule 10b–5 claims under the 1934 Act. Systemic change on this scale should be implemented, if at all, by Congress and not this Court.

The holding in this case is important to all publicly held companies and their shareholders, who have an interest in maintaining the balanced, fair, and predictable securities litigation system established by the Reform Act. This system would be thrown into chaos if SLUSA were interpreted to permit concurrent state-court jurisdiction over securities class actions under the 1933 Act. WLF is particularly concerned about the impact of this decision on technology and other growth companies, whose volatile stock prices make them especially vulnerable to abusive securities class actions. Many such companies are located in Silicon Valley in

California, where a spate of class actions asserting 1933 Act claims has been filed since the California Court of Appeal issued its decision in *Luther* v. *Countrywide Fin. Corp.*, 195 Cal. App. 4th 789 (2011). *Countrywide* incorrectly held that SLUSA maintained state-court jurisdiction over 1933 Act covered class actions, and that 1933 Act cases filed in state court cannot be removed to federal court. By permitting 1933 Act covered class actions to be filed in state courts subject to a removal bar, *Countrywide* and other California decisions endanger the value of these companies and the interests of their shareholders.

SUMMARY OF ARGUMENT

WLF agrees with the textual arguments advanced by Petitioners in this case. SLUSA's full context reinforces them. SLUSA is one piece of a multipart and interconnected regulatory scheme governing securities litigation. WLF submits this brief to clarify the meaning of SLUSA by examining the broader legislative framework within which the statute was designed to operate.

SLUSA was designed to prevent plaintiffs from circumventing the Reform Act, which in turn was designed to discourage the filing of abusive, unmeritorious class actions resulting in extortionate settlements—to the ultimate detriment of shareholders and the economy as a whole. When viewed in that context, it is overwhelmingly clear that SLUSA meant to establish exclusive federal-court jurisdiction over virtually all securities class actions, and thereby

maintain a system in which related claims are consolidated and heard in the same federal forum at the same time, governed by the consistent standards established by the Reform Act.

The proper interpretation of SLUSA becomes even more clear upon examining the practical consequences of upholding *Countrywide*. The same class of plaintiffs commonly asserts closely related claims for violation of Sections 11 or 12(a)(2) (under the 1933 Act) and Section 10(b) (under the 1934 Act). These claims often challenge the very same allegedly false or misleading statements, and by definition involve identical class-wide causation issues. The Reform Act and SLUSA envision that these intimately related claims will be consolidated and heard in the same federal forum, and would be subject to the "uniform standards" applied by all federal courts.

But under the interpretation of SLUSA adopted by *Countrywide*, plaintiffs can decide to split the Section 11 and 12(a)(2) claims from the 10(b) claims, filing the former in state court while the latter proceed in federal court. Because *Countrywide* holds that a removal bar applies to securities class actions filed in state court, the 1933 Act claims *cannot* be consolidated with related 10(b) claims and *must* proceed in different courts, heard by different judges, subject to different procedural standards and pleading rules. This results in wasted judicial resources, inconsistent results, and undue burdens on parties that must defend themselves on multiple fronts in already-expensive litigation. More importantly, concurrent jurisdiction is antithetical to

SLUSA's stated purpose of preventing circumvention of the Reform Act and establishing a system of "uniform standards" governing class actions involving nationally traded securities.

Concurrent jurisdiction of 1933 Act claims would have broad ramifications for 1934 Act claims as well. Under *Countrywide*'s interpretation of SLUSA, not only would the Reform Act's protections be inapplicable to Section 11 and 12(a)(2) claims filed in state courts, but its consolidation and lead-plaintiff appointment procedure, automatic discovery stay, and heightened pleading standards would also be seriously undermined as to any related Section 10(b) claims proceeding simultaneously in federal court. For instance, the automatic stay of discovery in a Section 10(b) case becomes a weaker shield against abusive lawsuits when discovery can proceed full bore in a closely related state-court case. Likewise, plaintiffs who file their Section 11 and 12(a)(2) claims in state court do not have to hand control of the lawsuit to the lead plaintiff who is the "most adequate" class representative, and can more easily avoid the requirement of pleading claims that sound in fraud with particularity.

Thus, interpreting SLUSA to allow for concurrent jurisdiction of 1933 Act claims would undermine the Reform Act in a far-reaching way that Congress could not have intended. In practical effect, allowing for concurrent jurisdiction would expand the Rule 10b–5 implied right of action beyond the limited scope Congress understood it to have. *See Stoneridge Inv.*

Partners, LLC v. *Scientific-Atlanta*, 552 U.S. 148, 165–66 (2008) ("[W]hen [the Reform Act] was enacted, Congress accepted the * * * private cause of action as then defined but chose to extend it no further."). This would be a drastic shift. Absent a clear directive otherwise, this Court should decline to upset the carefully balanced securities litigation framework that Congress created and sought to reinforce by enacting SLUSA.

ARGUMENT

I. THE FEDERAL SECURITIES LAWS TOGETHER ESTABLISH A SYSTEM OF "UNIFORM STANDARDS."

A. The Securities Litigation System Was Designed to Balance Investor Protection and Avoidance of Vexatious Lawsuits.

This Court has observed that "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 78 (2006). Because of this market's importance to the overall health of our economy, Congress enacted a comprehensive legislative framework designed to "insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014) (citation omitted). The success of this system depends on balancing the goal of preventing

corporate fraud with the need to protect against "open-ended litigation [that] would itself be an invitation to fraud." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 760–61 (1975) (Powell, J., concurring). Maintaining this balance is especially important because it is shareholders who "ultimately bear the burden" of meritless litigation. *Id.* at 761 n.5.

To understand SLUSA, it is necessary to examine the statute in the context of this broader framework. The Securities Act of 1933 and the Securities Exchange Act of 1934 were enacted in response to the stock market crash of 1929 and the resulting Great Depression. *Dabit*, 547 U.S. at 78. These statutes have "anchored federal regulation of vital elements of our economy." *Ibid.* Their basic purpose is "to protect investor confidence in the securities markets" by making it unlawful to engage in fraud or deceit in connection with the purchase or sale of securities. *Chadbourne*, 134 S. Ct. at 1060.

The key provisions of the 1933 Act are Section 11, which establishes that any purchaser of a security may bring a private action for damages against the issuer if the registration statement is false or misleading (15 U.S.C. § 77k), and Section 12(a)(2), which similarly establishes a private right of action against any person who offers or sells a security through a prospectus or oral communication that is false or misleading (15 U.S.C. § 77l). Until SLUSA was enacted in 1998, Section 22 barred removal to federal court of 1933 Act claims filed in a court of "competent jurisdiction." 15 U.S.C. § 77v(a).

The key provision of the 1934 Act is Section 10(b), which, along with Securities and Exchange Commission (SEC) Rule 10b–5 promulgated thereunder, broadly prohibits deception, misrepresentation, and fraud "in connection with the purchase or sale of any security" based on any public corporate statement. 15 U.S.C. § 78j; 17 C.F.R. 240.10b–5. The 1934 Act established that federal courts have exclusive jurisdiction over cases brought pursuant to the statute. 15 U.S.C. § 78aa(a).

B. The Limited Implied Private Right of Action Under Rule 10b–5 Is a Key Component of the Balanced System.

Unlike Sections 11 and 12(a)(2), Section 10(b) of the 1934 Act does not expressly establish a private right of action. However, federal courts soon began to recognize that Rule 10b–5 impliedly creates one. *See Kardon* v. *Nat'l Gypsum Co.*, 69 F. Supp. 512, 513–14 (E.D. Pa. 1946). Over the next 25 years, the implied private right of action was recognized by an "overwhelming consensus of the District Courts and Courts of Appeals," and was endorsed by this Court in 1971. *Blue Chip Stamps*, 421 U.S. at 730 (citing *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)).

But this Court has repeatedly declined to expand the scope of the implied private right of action—which it has described as "a judicial oak which has grown from little more than a legislative acorn"—largely due to policy concerns related to the danger that Rule 10b–5 will be used as a vehicle for particularly vexatious litigation. *Id.* at 737; *Dabit*, 547 U.S. at 80 (2006). In *Blue Chip*

Stamps, this Court held that standing to bring a private action for damages under Rule 10b–5 is limited to actual purchasers or sellers of securities. In declining to expand the private right of action to other plaintiffs, the Court cited the "widespread recognition that litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." 421 U.S. at 739. For one thing, "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial"; for another, the "potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation." *Id.* at 740–41. The Court in *Blue Chip Stamps* gave considerable weight to these policy concerns in declining to expand the private right of action precisely because that right is judicially recognized, not expressly created by Congress. "Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b–5," the Court concluded, "practical factors" are "entitled to a good deal of weight." *Id.* at 749.

In 1994, the Court once again declined to expand the private right of action, holding in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that plaintiffs may not maintain an aiding and abetting suit under Rule 10b–5. The Court noted that aiding and abetting violations are remediable in actions brought by the Securities Exchange

Commission (SEC), but that permitting private parties to sue secondary actors for aiding and abetting "exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets," including those associated with the unpredictable nature of liability in such cases. *Id.* at 183, 188–89. And once again, the Court cited the particular danger of vexatious litigation under Rule 10b–5, observing that the heavy defense costs incurred by professionals accused of aiding and abetting may, perversely, be ultimately borne "by the company's investors, the intended beneficiaries of the statute." *Id.* at 189.

C. The Reform Act Restored Balance to the System.

By the 1990s, private securities litigation had gotten out of control, and the system was no longer achieving the "balance" that Justice Powell cautioned was necessary to give effect to the language and purpose of the federal securities laws. *Blue Chip Stamps*, 421 U.S. at 760–61 (Powell, J., concurring). The class action mechanism had enabled plaintiffs' lawyers to file abusive "'strike' suits" targeting deep-pocketed defendants, often on behalf of "'professional' plaintiffs" with only nominal holdings in the company. S. Rep. No. 104-98, at 4 (1995); H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.). Congress found that these abuses resulted in extortionate settlements, chilled discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors, injuring the "investing public and the entire U.S. economy[.]"

H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.). Shareholders bear the brunt of these abuses; "[i]nvestors always are the ultimate losers when extortionate 'settlements' are extracted from issuers." *Id.* at 32.

To protect the interests of shareholders and the economy as a whole, and to restore balance to the system to enable it to function fairly and efficiently once again, the Reform Act implemented procedural reforms designed to discourage plaintiffs from filing abusive cases and to encourage defendants to fight abusive cases that are filed. Under the Reform Act, lead plaintiffs asserting 1933 Act or 1934 Act claims on behalf of a class are no longer selected based on who wins the "race to the courthouse"; instead, courts must engage in a process to determine which purported class member is "most capable of adequately representing the interests of class members" as the lead plaintiff. 15 U.S.C. § 78u-4(a)(3); 15 U.S.C. § 77z-1(a)(3); *see* H.R. Rep. No. 104-369, at 33 (1995) (Conf. Rep.). This discourages plaintiffs' lawyers from filing class actions on behalf of "professional plaintiffs" who receive a "bounty for their services" and have no real interest in the outcome of the litigation. H.R. Rep. No. 104-369, at 33 (1995) (Conf. Rep.). Congress understood that plaintiffs with more significant holdings—principally institutional investors—would exercise more control over class counsel, thereby improving the quality of the representation to the benefit of all shareholders. *Id.* at 34.

Naturally, Congress intended for the most adequate

lead plaintiff to represent the class as to *all* its related securities claims. The Reform Act accordingly amended both the 1933 Act and the 1934 Act to require courts to make the lead-plaintiff determination *after* deciding any motions to consolidate, and that a single "most adequate plaintiff" must be appointed as the lead plaintiff for *all* consolidated actions. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii).

In addition, the Reform Act imposes heightened pleading standards requiring plaintiffs to plead falsity, materiality, and scienter with particularity as to each statement challenged under Section 10(b). 15 U.S.C. § 78u-4(b)(1)–(2). Likewise, Congress understood that the Federal Rules of Civil Procedure would apply to Section 11 and 12(a)(2) claims under the 1933 Act[2]—including Rule 9(b)'s requirement that claims that "sound in fraud" be pled with particularity. *See infra* at 29–30. The heightened pleading requirements, which require plaintiffs to plead with particularity each statement alleged to have been misleading and the reasons why it is misleading, were meant to make it easier for courts to dismiss unfounded fraud allegations. H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.).

As a complement to the heightened pleading standards, which encourage defendants to seek dismissal of unmeritorious claims at the pleading stage,

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[2] Both the 1933 Act and the 1934 Act provide that the Reform Act's provisions apply to class actions brought "pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 77z-1(a)(1); 15 U.S.C. § 78u-4(a)(1).

the Reform Act also amended both the 1933 Act and the 1934 Act to establish an automatic stay of discovery while any motion to dismiss is pending. 15 U.S.C. § 78u-4(b)(3)(B); 15 U.S.C. § 77z-1(b). The automatic stay enables defendants to seek dismissal of unsupported claims before having to face "fishing expeditions" or exorbitant discovery costs. H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.). Prior to the Reform Act, plaintiffs were able to file lawsuits without even knowing the basis for their own claims, and could "search through all of the company's documents and take endless depositions" in an effort to find one. *Ibid.* (internal quotation marks omitted). The high costs associated with responding to such invasive discovery often coerced defendants into settling even frivolous lawsuits. *Ibid.* By disallowing these abusive discovery practices, the Reform Act's discovery stay essentially requires plaintiffs to have a valid basis for their claims *before* filing a lawsuit, which discourages "strike suits."

D. The Reform Act Accepted the Implied Private Right of Action as Then Defined.

The Reform Act's provisions were designed to apply to private securities class actions whether they asserted 1933 Act claims (pursuant to that statute's express right of action) or Section 10(b) claims (pursuant to the judicially implied right of action). In passing the Reform Act, Congress "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166 (2008).

This Court has since repeatedly declined to expand the private right of action beyond its scope as understood by Congress, noting that it is a "judicial construct" that "should not be extended beyond its present boundaries." *Id.* at 164–65. In *Stoneridge*, the Court declined to extend the private right of action to reach participants in a "scheme" to violate Section 10(b) who themselves made no misleading statements. The Court held that the SEC's enforcement power may reach such actors, but that allowing them to be sued in a private action creates a "risk that the federal power would be used to invite litigation" that would apply to "the entire marketplace in which the issuing company operates." *Id.* at 161–62. This would expose more defendants to the extensive discovery, uncertainty, and disruption that "allow plaintiffs with weak claims to extort settlements from innocent companies." *Id.* at 163–64. Exercising restraint in considering the scope of the private right of action, the Court explained, is appropriate in light of the Reform Act's heightened pleading standards and other requirements, which "touch upon the implied right of action" and caution against expansion. *Id.* at 165–66.

Likewise, in *Janus Capital Grp., Inc.* v. *First Derivative Traders*, the Court declined to extend the private right of action to apply to persons merely "involved in preparing" allegedly false or misleading statements, in accordance with the "narrow scope that we must give the private right of action." 564 U.S. 135, 144, 148 (2011). Again, the Court pointed out that suits against such secondary actors can be brought by the SEC, but that expanding the private right of action

would "create the broad liability that we rejected in *Stoneridge*." *Id.* at 143, 146.

As illustrated by the history of post-Reform Act decisions concerning the private right of action, this Court shares and has addressed Congress's concern that securities class actions present a particular danger of vexatiousness leading to coerced settlements. Preserving the limited scope of the private right of action is necessary to keep these risks in check.

E. SLUSA Was Designed to Prevent Circumvention of the Reform Act.

Congress enacted SLUSA to prevent plaintiffs from circumventing the Reform Act by filing class actions in state court. Prior to the Reform Act, state-court litigation of class actions involving nationally traded securities had been rare. *Dabit*, 547 U.S. at 82. But because the Reform Act made it more difficult for unmeritorious suits to survive past the pleading stage in federal court, it had the "unintended consequence" of "prompt[ing] at least some members of the plaintiffs' bar to avoid the federal forum altogether" by filing class actions in state court instead. *Ibid.* Congress enacted SLUSA to prevent such circumvention of the Reform Act and to ensure that class actions involving nationally traded securities would be subject to "uniform standards" under a single federal framework. H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.). SLUSA accomplishes this goal by eliminating state-court jurisdiction over "covered class actions," broadly defined as any damages action on behalf of more than 50 people.

See Brief for Petitioners, pp. 7–8, 10–11, 15–16.

The legislative history of SLUSA makes it abundantly clear that Congress designed the statute to give federal courts exclusive jurisdiction over virtually all private class actions involving nationally traded securities. The House Conference Report explains that SLUSA "makes Federal court the exclusive venue for most securities class action lawsuits." H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.). SLUSA's purpose is "to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court." *Ibid.* These protections include both the substantive and the procedural provisions of the Reform Act, "essentially none" of which apply in state courts. *Id.* at 15.

Notably, Congress expressed particular concern about the "increase in parallel litigation between state and federal courts in an apparent effort to avoid the federal discovery stay or other provisions of the [Reform] Act." *Id.* at 13 (citation omitted). Accordingly, this Court has previously rejected any construction of SLUSA that raises the prospect of "parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts," as this "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Dabit*, 547 U.S. at 86–87 (quoting SLUSA § 2(5), 115 Stat. 3227).

Taken together, the 1933 and 1934 Acts, the Reform Act, and SLUSA create a uniform system in which securities class actions involving the same factual issues are designed to be considered at the same time, in the same federal forum, prosecuted by one lead plaintiff, and subject to the same substantive and procedural standards as established by the Reform Act.

II. *COUNTRYWIDE* DISRUPTS THE SYSTEM IN A WAY CONGRESS COULD NOT HAVE INTENDED.

A. Under *Countrywide*, Related 1933 Act and 1934 Act Cases May Proceed Concurrently in State and Federal Court.

As noted above, when the Reform Act was enacted, class actions asserting claims related to nationally traded securities were nearly always filed in federal court. Congress therefore understood and expected that cases asserting "substantially the same claim or claims arising under" the securities laws would be consolidated in one federal forum using the mechanism provided by Federal Rule of Civil Procedure 42, and the Reform Act requires that these consolidated actions must be controlled by a single lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii). However, according to *Countrywide*, state courts have concurrent jurisdiction over 1933 Act claims—and moreover, a statutory removal bar requires that 1933 Act claims

filed in state court must remain there.[3] 195 Cal. App. 4th at 797–98. Thus, *Countrywide* permits a class action asserting Section 11 or 12(a)(2) claims under the 1933 Act to proceed in state court at the same time that a related Section 10(b) class action is proceeding under the 1934 Act in federal court—even when the claims and the classes asserting them are virtually identical.

Such a system is inherently dysfunctional, and particularly so because Section 11 and 12(a)(2) claims are often closely related to Section 10(b) claims. For instance, plaintiffs alleging false or misleading corporate statements in the context of an initial public offering (IPO) almost invariably challenge these same statements under both Section 11 and Section 10(b). Likewise, the class of purchasers harmed by a stock price drop will be comprised of the same members in both actions. Questions of causation will be common to both actions as well, since the alleged misrepresentations must be causally related to what made the stock price drop. *See infra* at 30.

Congress's vision of a balanced, fair, and predictable securities litigation system did not include parallel tracks in which class actions that share so many similarities can be heard in different courts, subject to different standards, with no possibility of consolidation or the appointment of a single lead plaintiff. Indeed, in enacting SLUSA, Congress specifically sought to remove

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[3] The United States argues that 1933 Act cases can be filed in state court and *can* be removed, but its interpretation is unfaithful to the statutory text. *See* Brief for Petitioners at 40–43.

concurrent state-court jurisdiction over securities class actions involving nationally traded securities—and expressed particular concern about "increased *parallel state and federal litigation*" brought by plaintiffs "in an effort to avoid federal discovery stays or to establish alternative state court venues for settlement of federal claims." S. Rep. No. 105-182, at 3 (1998) (emphasis added) (citation omitted).

The solution, Congress determined, was to "mak[e] Federal court the exclusive venue for most securities class action lawsuits" in order to "prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing in State, rather than in Federal, court." H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.). Indeed, Congress specifically identified the limited exceptions to exclusive federal jurisdiction under SLUSA—and 1933 Act claims brought in state court are not among them.[4]

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[4] The exceptions are:

> (1) certain actions that are based upon the law of the state in which the issuer of the security in question is incorporated, (2) actions brought by States and political subdivisions, and State pension plans * * *; and (3) actions by a party to a contractual agreement (such as an indenture trustee) seeking to enforce provisions of the indenture. Additionally, the legislation provides for an exception of the definition of 'class action' for certain shareholder derivative actions.

H.R. Rep. No. 105-803, at 12 (1998) (Conf. Rep.) (footnote and paragraph break omitted).

B. Recent Cases Illustrate the Messiness of Concurrent Jurisdiction.

The dysfunction inherent in a system that permits concurrent state and federal jurisdiction is far from hypothetical. Simultaneous state and federal proceedings are increasingly frequent, particularly in California courts, and they are riddled with logistical and substantive problems.

To take an example, in *Altayyar* v. *Etsy, Inc.*, Case No. 15-cv-2785 (E.D.N.Y., filed May 13, 2015), plaintiffs filed a securities class action complaint in federal court against e-commerce giant Etsy, Inc. in connection with Etsy's initial public offering. While motions to appoint a lead plaintiff in the federal action were pending, a different plaintiff filed suit in California Superior Court alleging 1933 Act claims only, on behalf of essentially the same class, in connection with the same alleged conduct. The defendants removed the state action to federal court and moved to transfer it to the Eastern District of New York—where Etsy is headquartered, most of the conduct at issue took place, and nearly all documents and witnesses were located—for potential consolidation with the 1934 Act case. *See Cervantes* v. *Dickerson et al.*, Case No. 15-cv-3825 (N.D. Cal., filed Aug. 20, 2015). But the district court granted the state plaintiff's motion to remand the California action, and the defendants were left litigating essentially the same claims in two different fora, before two different decisionmakers, with two different sets of procedural rules.

As one might expect, this created a host of inefficiencies for both the courts and the litigants. For the first few months, discovery in the federal action was stayed under the Reform Act, even as discovery moved forward in the state proceeding. Defendants eventually convinced the California court to stay the state proceedings on *forum non conveniens* grounds, allowing the federal case to take the lead. This led the state plaintiffs to seek to intervene in the federal action, asking the federal court to stay the *federal* case in favor of the California action or, alternatively, to re-litigate appointment of the lead plaintiff in the federal suit so that the state plaintiff could participate. The federal court denied the motion to intervene, and a few months later granted the defendants' motion to dismiss the federal action in its entirety with prejudice. That decision is now on appeal, while the state court case remains active. Messy, highly inefficient parallel proceedings of this type delay the litigation process, waste judicial resources, subject defendants to inconsistent discovery obligations, and carry a high risk of inconsistent results.

In some cases—particularly where the parallel proceedings move at vastly different speeds—they also allow 1933 Act cases in state court to drive the results in related 1934 Act cases in federal court. For example, Pacific Biosciences of California was sued in connection with its initial public offering in five different actions at the end of 2011. Three of these were 1933 Act cases consolidated in California Superior Court; the other two, alleging 1933 and 1934 Act claims, were filed and

consolidated in federal court. *See In re Pacific Biosciences of Cal. Inc. Sec. Litig.*, Case No. CIV 509210 (San Mateo Cty. Sup. Ct., filed Oct. 21, 2011); *Primo* v. *Pacific Biosciences of Cal., Inc.*, Case No. 11-cv-6599 (N.D. Cal., filed Dec. 21, 2011). The consolidated federal action was subject to the Reform Act's discovery stay for the year and a half it took to complete the motion to dismiss process; on April 15, 2013, the court dismissed the federal action in its entirety, giving plaintiffs a month within which to file an amended complaint.

In the meantime, the state court action had advanced through the filing of two amended complaints, a decision on defendants' motions to dismiss, answers to the complaint, some party and third-party discovery, and a mediation resulting in a settlement agreement (though the federal lead plaintiffs were excluded from this process and only informed after the fact). On June 3, 2013, the state court preliminarily approved the settlement and conditionally certified a settlement class that was identical to the class the plaintiffs in the federal suit claimed to represent. One day before the federal amended complaint was due, the defendants moved to stay the federal proceeding—still in the pleadings stage—on the theory that if and when the preliminary state settlement became final, it would extinguish the federal class claims in their entirety. Plaintiffs in the federal action opposed defendants' motion, arguing that the federal court had an obligation to preside over disposition of the 1934 Act claims, over which it had exclusive jurisdiction. Plaintiffs instead

asked the court to enjoin the *state* proceedings, claiming that the parties in the state court action were improperly circumventing the Reform Act's lead-plaintiff provisions and undermining the statutory scheme by seeking to settle the 1934 Act claims in the state forum. The federal court denied both motions to stay; the state court settlement received final approval; and the federal proceeding was voluntarily dismissed a few months later (after a lead plaintiff who had opted out of the state settlement reached his own settlement with defendants).

In short, because the 1933 Act case proceeded under state court rules and was not subject to the Reform Act's automatic discovery stay, it advanced to a point where the parties needed to mediate and settle before the federal court could even decide the motion to dismiss (which it ultimately granted). In a very real way, allowing parallel proceedings of this type strips federal courts of the exclusive jurisdiction and decisionmaking authority over 1934 Act claims that the Reform Act and SLUSA sought to establish.

C. Concurrent Jurisdiction Undermines the Reform Act.

To give proper effect to SLUSA and avoid problems like those outlined above, the Court should consider that upholding *Countrywide* would undermine the Reform Act—as to both 1933 Act cases filed in state court *and* related 1934 Act cases proceeding simultaneously in federal court. It is appropriate for the Court to consider

how the entire securities litigation system, not just SLUSA, was designed to operate. *Cf. Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014) (reading the Reform Act "in light of and consistent with the underlying regulatory statutes").

As discussed below, interpreting SLUSA to allow for concurrent jurisdiction would undo key aspects of the Reform Act by preventing consolidation of related cases and the appointment of a single lead plaintiff; undermining the Reform Act's discovery stay and heightened pleading standards; and in a meaningful sense expanding the implied private right of action under Rule 10b–5 by exposing defendants to more lawsuits based on weaker claims and to the drastically higher costs associated with defending them. In short, the balance that the Reform Act and SLUSA sought to restore to the system would be lost.

1. Concurrent Jurisdiction Prevents Consolidation of Related Cases.

The Reform Act's consolidation and lead-plaintiff appointment process was a centerpiece of the legislation. Congress was deeply concerned that "professional plaintiffs" with no real stake in the company "do not adequately represent other shareholders," and have little interest in exercising oversight over class counsel. H.R. Rep. No. 104-369, at 32–35 (1995) (Conf. Rep.). Congress addressed this problem by mandating that courts "shall appoint the most adequate plaintiff" as lead plaintiff over all consolidated actions. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii). This protects

absent class members whose interests are aligned with the lead plaintiff's. For instance, settlements negotiated under the supervision of adequate lead plaintiffs are generally more "'fair and reasonable' than is the case with settlements negotiated by unsupervised plaintiffs' attorneys." H.R. Conf. Rep. No. 104-369, at 35 (1995) (Conf. Rep.).

Consolidation is an important step in the lead-plaintiff process, since class members' interests cannot be adequately represented by competing lead plaintiffs in parallel class actions. That is why the Reform Act requires appointment of a lead plaintiff over *all* consolidated actions following adjudication of any consolidation motions. 15 U.S.C. § 78u-4(a)(3)(B)(ii); 15 U.S.C. § 77z-1(a)(3)(B)(ii). Further, "consolidation of enforcement control in a single liability regime without the ability to shift fora" is a critical component of a successful system for securities-fraud deterrence, which was an animating idea behind SLUSA. Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 362 (2015). After all, a system in which related cases are not consolidated, and which allows for the possibility of "parallel class actions proceeding in state and federal court," gives rise to "wasteful, duplicative litigation" and "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Dabit*, 547 U.S. at 86–87 (quoting SLUSA § 2(5), 112 Stat. 3227).

But under *Countrywide*, related securities class

actions *cannot* be consolidated in a single forum because SLUSA purportedly bars removal of 1933 Act claims. 195 Cal. App. 4th at 797–98. Indeed, many courts have rejected defendants' attempts to remove 1933 Act claims and consolidate them with Section 10(b) claims proceeding at the same time in federal court. *See, e.g.*, *Cervantes* v. *Dickerson et al.*, Case No. 15-cv-3825 (N.D. Cal., filed Aug. 20, 2015) (1933 Act case remanded in spite of pending motion to transfer to E.D.N.Y where earlier-filed 1934 Act case was being heard); *Buelow et al.* v. *Alibaba Group Holding Ltd. et al.*, Case No. 15-cv-5179 (N.D. Cal., filed Nov. 12, 2015) (1933 Act case remanded even though MDL panel was set to decide within days whether to transfer case to S.D.N.Y. where earlier-filed, consolidated 1934 Act cases were being heard).

Countrywide thus undermines the intent and policy goals behind the Reform Act's consolidation and lead-plaintiff appointment process. Under *Countrywide*, plaintiffs can file wasteful, duplicative, parallel securities class actions in state courts, where the "uniform standards" established by the Reform Act and reinforced by SLUSA do not apply. *See In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 934 F. Supp. 2d 1219, 1233 (C.D. Cal. 2013) ("The [Reform Act] was designed to reduce abusive filings. * * * Filings in state court are not subject to any of the reforms in that legislation, and so are more likely to permit such abuse."). Fractured class actions not only waste judicial resources and unduly burden

defendants—they can harm absent class members as well. For instance, when cases are not consolidated under the direction of a single lead plaintiff, the lead plaintiffs representing competing classes could end up undermining each other or taking inconsistent positions, to the detriment of class members who lack control over the litigation.

In addition, under *Countrywide*, plaintiffs who file class claims in state court are once again incentivized to "race to the courthouse" regardless of whether they have a genuine interest in the lawsuit, because the Reform Act's lead-plaintiff provisions do not apply in state courts. *See In re Countrywide Fin. Corp.*, 934 F. Supp. 2d at 1233; 15 U.S.C. § 77z-1(a)(1). The consequences of this are felt not only in the 1933 Act case, but also in any simultaneously proceeding 1934 Act case, as is well illustrated by Etsy's experience. *See supra* at 20–21. Because Section 10(b) claims must be filed in federal court, the "most adequate plaintiff" will have control over those proceedings—including, for instance, deciding whether to settle the case under certain terms. However, an individual investor with no more than a nominal stake in the company can hijack this process by filing a related Section 11 class action in state court. The individual investor, whose interests may not align with those of the class, can then inject himself into the strategic driver's seat, depriving the "most adequate plaintiff" of the power to agree to a strategic course of action—including undermining a settlement that is in the best interests of the class. Congress surely did not

intend to return such power to the hands of "professional plaintiffs."

2. Concurrent Jurisdiction Disrupts Key Procedural Elements of the Securities Laws.

Taken together, the Reform Act and SLUSA prescribe that once related cases are consolidated, they will be subject to the Reform Act's automatic discovery stay and heightened pleading standards of the Reform Act and the Federal Rules of Civil Procedure. But when 1933 Act cases are filed in state court, these important protections are lost. State courts apply their own procedural rules and more relaxed pleading standards to securities class actions—which is precisely why they are attractive venues for plaintiffs seeking to circumvent federal standards. *Supra* at 15–16. Moreover, filing 1933 Act claims in state court seriously undermines the Reform Act as to any simultaneously proceeding 1934 Act claims as well.

State courts often refuse to stay discovery while a motion to dismiss is pending on the grounds that the Reform Act's automatic discovery stay only applies in federal court. *See* Brief for Petitioners at 27; *supra* at 20–23. When facing a Section 11 claim in state court where discovery has not been stayed, defendants are much more susceptible to being coerced into settling unmeritorious claims by unbearable discovery costs—just as they were before the Reform Act was passed. Moreover, when a Section 10(b) class action is proceeding in federal court at the same time, there is a

risk that the Reform Act's discovery stay will lose its teeth in that case as well—as illustrated by the experience of Pacific Biosciences of California. *See supra* at 21–23. Although discovery is stayed as to the 10(b) claim while a motion to dismiss is pending, discovery that is directly related to that claim may move ahead in the state-court 1933 Act case. Defendants then face the same onerous discovery costs that the Reform Act was designed to rein in before they are able to obtain dismissal of a meritless 10(b) claim. This is precisely what the Reform Act and SLUSA are designed to avoid.

A similar incongruity occurs with respect to the standards for pleading a claim under the securities laws, which differ in state and federal courts. At a minimum, Congress understood when it passed the Reform Act that the Federal Rules of Civil Procedure would apply to claims of misrepresentation under the securities laws, as it assumed these claims would be filed in federal court. *Supra* at 12, 17; *see also* H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.) (discussing Rule 9(b)'s applicability to allegations of securities fraud). But, as discussed below, *Countrywide* permits plaintiffs to avoid the more demanding federal pleading standards by filing in state courts, which often require no more than notice pleading. This is particularly problematic with respect to Section 11 claims that "sound in fraud," because filing such claims in state court—where they can be alleged separately from claims of fraud under Section 10(b)—makes it easier for plaintiffs to disclaim any reliance on a fraud theory.

Today, it is well established that Section 11 claims under the 1933 Act that sound in fraud are subject to Rule 9(b).[5] Although Section 11 does not necessarily *require* proof of fraud, Rule 9(b) refers to "alleging fraud"—not to causes of action for which fraud is an element. Requiring Section 11 claims that sound in fraud to be pled with particularity prevents plaintiffs from performing an end-run around the pleading requirements by "adding a superficial label of negligence or strict liability." *Cozzarelli* v. *Inspire Pharm. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008). It is often difficult for plaintiffs to plead around their Section 10(b) fraud allegations in framing a Section 11 claim when they are asserting both claims in the same case. After all, the element of loss causation (and its companion defense of negative causation under Section 11) requires that the alleged misrepresentations be causally related to what made the stock price drop. *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35–37 (2d Cir. 2009). This means that the essence of the '33 and 1934 Act claims is necessarily the same. Thus, when Section 11 and

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[5] *See, e.g.*, *Silverstrand Inv.* v. *AMAG Pharm., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013); *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014); *Cal. Pub. Emps.' Ret. Sys.* v. *Chubb Corp.*, 394 F.3d 126, 160–63 (3d Cir. 2004); *Cozzarelli* v. *Inspire Pharm. Inc.*, 549 F.3d 618, 629 (4th Cir. 2008); *Lone Star Ladies Inv. Club* v. *Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001); *Republic Bank & Trust Co.* v. *Bear Stearns & Co., Inc.*, 683 F.3d 239, 256 n.7 (6th Cir. 2012); *Kennedy* v. *Venrock Assocs.*, 348 F.3d 584, 593 (7th Cir. 2003); *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 885–86 (9th Cir. 2012); *Wagner* v. *First Horizon Pharm. Corp.*, 464 F.3d 1273, 1277 (11th Cir. 2006).

Section 10(b) claims are asserted in the same consolidated federal case, as contemplated by the Reform Act, Section 11 claims often sound in fraud and so are subject to Rule 9(b).

However, *Countrywide* permits Section 11 claims to be split from 10(b) claims—thus enabling plaintiffs to plead around the sounds-in-fraud rule. As discussed above, if a Section 11 case were filed in federal court and consolidated with the 10(b) case as contemplated by the Reform Act, this would ensure the application of Rule 9(b). This is what Congress intended. Indeed, at the time the Reform Act was passed, the application of Rule 9(b) to securities claims was well-established and has since become nearly uniform. *Supra* at 30 & n.5. Indeed, the Reform Act's pleading requirements for 1934 Act cases arguably codified the standard for pleading falsity adopted by the Ninth Circuit in *In re GlenFed Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), *superseded by statute on other grounds as stated in SEC v. Todd*, 642 F.3d 1207, 1216 (9th Cir. 2011). William S. Lerach & Eric Alan Isaacson, *Pleading Scienter under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893, 894–95 (1996). Congress could not have intended for a class of plaintiffs to be able to split up their Section 11 claims on the one hand, and their Section 10(b) claims on the other, in order to avoid the application of Rule 9(b) to the former.

In many state courts, the pleading standard for

falsity is far lower than the standard established by Rule 9(b), requiring no more than notice pleading. *See, e.g.*, *In re Mobileiron, Inc. S'holder Litig.*, Santa Clara Cty. No. 2015-1-CV-284001, 2016 WL 9137540, at *4 (Oct. 4, 2016) (finding that plaintiffs' Section 11 claim did not sound in fraud and therefore was "subject to the general pleading standard in California"). Worse, as in many states, California's equivalent of Federal Rule of Civil Procedure 8 does not even incorporate the "plausibility" requirement established by *Bell Atlantic Corp.* v. *Twombly*[6] and *Ashcroft* v. *Iqbal*.[7] California courts considering demurrers (the California equivalent of a motion to dismiss) consider the facts alleged in the complaint to be true "however improbable they may be." *See, e.g.*, *Berg & Berg Enters., LLC* v. *Boyle*, 178 Cal. App. 4th 1020, 1034 (2009) (citation omitted). Naturally, this means that significantly fewer Section 11 claims are dismissed at the pleading stage in state courts than in federal courts, as other *amici* have pointed out in support of the Petition for Writ of Certiorari in this matter. *See* Brief of *Amici Curiae* Law Professors in Support of Petitioners filed June 27, 2016, pp. 3–4, 12–13.

3. Concurrent Jurisdiction Effectively Expands the Rule 10b–5 Implied Private Right of Action.

The private right of action applies to claims brought under Section 10(b) of the 1934 Act and Rule 10b–5,

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[6] 550 U.S. 544 (2007).

[7] 556 U.S. 662 (2009).

whereas the SLUSA issue presented by this case on its face involves only 1933 Act claims. But as demonstrated above, 1933 Act and 1934 Act claims are often closely interrelated, and allowing them to proceed simultaneously in state and federal court thwarts the Reform Act's objectives in both cases. A system that permits such concurrent lawsuits has the practical effect of expanding the limited implied right of action for Section 10(b) claims by increasing defendants' exposure to abusive lawsuits and reintroducing the chaos that the Reform Act and SLUSA sought to contain.

This Court has repeatedly declined to expand the private right of action beyond its limited scope, particularly in the wake of the Reform Act. *Supra* at 13–15. In part, this is because the Reform Act's requirements "touch upon the implied right of action * * * ." *Stoneridge*, 552 U.S. at 165. Congress understood the implied right of action to be limited in scope and to be subject to the Reform Act's provisions; in passing the Reform Act, it "ratified the implied right of action" as "then defined" but "chose to extend it no further." *Id.* at 165–66. Consistent with this history, and with the Reform Act's rebalancing of the system to curb vexatious and abusive litigation, the Court "must give 'narrow dimensions * * * to a right of action Congress did not authorize when it first enacted the [1934 Act] and did not expand when it revisited the law.'" *Janus Capital*, 564 U.S. at 142 (quoting *Stoneridge*, 552 U.S. at 167).

As discussed above, permitting plaintiffs to file 1933

Act covered class actions in state court undermines the Reform Act as to both the 1933 Act claims and any Section 10(b) claims proceeding simultaneously in federal court. Contrary to the Reform Act, such cases cannot be consolidated; a single, most adequate lead plaintiff cannot be appointed; the discovery stay becomes less effective in protecting against abusive claims; and the pleading standards can be more easily circumvented. Gutting these key provisions of the Reform Act effectively expands liability for Section 10(b) defendants, who may be forced to defend related litigation on multiple fronts, shoulder enormous discovery costs before the sufficiency of plaintiffs' allegations have been tested, and face inconsistent obligations imposed by different courts.

III. THERE IS NO POLICY RATIONALE SUPPORTING *COUNTRYWIDE*'S READING OF SLUSA.

Not only does *Countrywide* disrupt the uniform system designed by Congress, and undermine Congress's clearly expressed intent in enacting SLUSA, but it is also difficult to imagine a policy rationale for allowing 1933 Act claims to proceed in state court while removing state-court jurisdiction over all other covered class actions. Respondents assert that this is what the text of SLUSA requires, but point to no convincing policy reasons why this would be so.

One conceivable rationale would be to preserve plaintiffs' ability to choose the forum in which they bring suit. This makes sense as to suits brought by individual plaintiffs on their own behalf, and indeed, such suits are

not within SLUSA's definition of a "covered class action" over which federal courts have exclusive jurisdiction. 15 U.S.C. § 77p(f)(2). However, when a lead plaintiff brings a class action as a representative of class members located throughout the country, the lead plaintiff's choice of forum is hardly relevant. *See Lou* v. *Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (lead plaintiff's choice of forum is entitled to "minimal consideration"); *In re Warrick*, 70 F.3d 736, 741 n. 7 (2d Cir. 1995) ("the plaintiff's choice of forum is a less significant consideration in a * * * class action than in an individual action").

Another conceivable rationale would be to maintain state courts' position within our federal system. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 19. But Congress considered and rejected this rationale when it passed SLUSA. S. Rep. No. 105-182, at 4 (1998) (the Committee acknowledged concerns about the bill being an "affront on Federalism" but "found the interest in promoting efficient national markets to be the more convincing and compelling consideration"). Furthermore, as this Court has noted, the assertion of state-law securities claims was "virtually unheard of before SLUSA was enacted * * * . This is hardly a situation, then, in which a federal statute has eliminated a historically entrenched state-law remedy." *Dabit*, 547 U.S. at 88. Likewise, "[p]rior to the passage of the Reform Act, there was essentially no significant securities class action litigation *brought in State court*." H.R. Rep. No. 105-803, at 14 (1998) (Conf. Rep.) (emphasis added). Given this context, if Congress

had intended to permit state-court jurisdiction over federal securities class action claims, it would have said so explicitly.

Furthermore, interpreting SLUSA to allow for concurrent jurisdiction over 1933 Act claims would have broad, negative policy consequences. As discussed above, allowing for concurrent jurisdiction would subvert the Reform Act by undercutting the procedural protections it provides as to both 1933 Act and 1934 Act claims, and thereby expanding the private right of action as to Rule 10b–5 claims. A return to the pre-Reform Act status quo would throw the national securities market back into chaos, harming public companies, their shareholders, and the U.S. economy as a whole. The only real beneficiaries of this would be plaintiffs' lawyers, who would once again be empowered to file meritless strike suits against deep-pocketed defendants on behalf of "professional plaintiffs" who do not represent the real interests of the most heavily invested shareholders.

CONCLUSION

For the reasons discussed above, WLF respectfully asks the Court to reverse the judgment of the California Court of Appeal, and to hold that SLUSA withdrew concurrent state-court jurisdiction over 1933 Act claims.

Respectfully submitted,

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